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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1795

CAPITAL CITIES CABLE, INC.; COX CABLE OF
OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; and
SAMMONS COMMUNICATIONS, INC.,

Petitioners,

v.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Tenth Circuit

BRIEF OF AMICI CURIAE
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
AND MAGAZINE PUBLISHERS ASSOCIATION
IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT OF INTEREST

This amicus curiae brief is submitted on behalf of the American Newspaper Publishers Association and Magazine Publishers Association in support of the petition for a writ of certiorari filed by Capital Cities Cable, Inc., Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc., and Sammons Communications, Inc.¹ The American Newspaper Publishers Association ("ANPA") is a national trade association representing approximately 1,400 newspapers which constitute

¹ A copy of the written consents of the parties is being filed with this brief pursuant to Rule 36 of this Court.

over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. Magazine Publishers Association ("MPA") is a national trade association representing approximately two hundred publishing companies which publish more than eight hundred consumer oriented magazines.

The decision below adversely affects ANPA member newspapers and MPA member magazines throughout the country and most immediately their Oklahoma members. The improper application of this Court's precedents regarding First Amendment protection of commercial speech threatens both newspapers and magazines and their readers. Whatever the merits of regulation of sale and consumption of alcoholic beverages, a ban on communication concerning those subjects is an unconstitutional option both under the decisions of this Court and in the view of the electronic *and print* media most directly affected. Left unreviewed, the decision below may encourage similar unconstitutional regulation by other states which could be applied to the print as well as the electronic media.

SUMMARY OF ARGUMENT

The Court of Appeals for the Tenth Circuit reversed a district court order declaring unconstitutional Oklahoma's ban of liquor ads on cable television. The district court's opinion placed cable television in the same category as out-of-state newspapers and magazines carrying liquor ads, which may be sold at outlets within the state under an opinion of the Oklahoma Attorney General.

The decision below severely distorts the principles developed by this Court to provide First Amendment protection to commercial speech and misapplies the tests stated by this Court. It disregards, too, the critical relationship, highlighted by this case, between commercial and "non-commercial" speech—if the commercial liquor advertisements are banned, the non-commercial programming (news, entertainment, and

otherwise) which they accompany may not be heard by Oklahoma citizens. The rationale of the decision logically would support prohibitions on out-of-state print publications as well as on out-of-state cable signals.

The decision of the Court of Appeals is of grave concern to the print as well as the electronic media and should be reviewed by this Court. If it is allowed to stand, other states may engage in similar regulatory efforts involving alcoholic beverages and other legal products and services. Other courts will be encouraged to similarly misconstrue the careful decisions of this Court over nearly ten years of refining and reinforcing the First Amendment protection of commercial speech.

ARGUMENT

I. The Rationale of the Decision Below Applies to the Print Media.

As a matter of discretionary interpretation, the Oklahoma Attorney General has not sought to prosecute Oklahoma distributors of out-of-state newspapers and magazines that include advertisements for liquor. Yet, the principles and tests applied by the court below equally support a prohibition on liquor advertisements in such newspapers or magazines. The nature of the speech is the same, the nature of the state interest is the same, and the Court of Appeals' misconstruction of the other elements of the *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), test presumably would be the same.

The cable petitioners accurately describe their predicament—the effective prohibition of the non-commercial programming that flows inevitably from a prohibition on liquor advertising and commercial speech. Newspapers and magazines outside Oklahoma fear the opinion below similarly could jeopardize their ability to send the *editorial* portions of their publications into Oklahoma should the prohibition on liquor advertising be applied to them. An administrative ruling of a state attorney general simply is inadequate constitutional protection in light of the Tenth Circuit opinion.

Out-of-state newspapers and magazines could be placed in the same extraordinary quandary in which the Petitioners have

been placed by the decision below. Distributors would be no more able to excise liquor advertisements from, for example, the Kansas City Star,² the New York Times or Time magazine than are the Cable Companies able to remove liquor advertisements from the Cable News Network or a must-carry signal from a neighboring state. For the out-of-state publisher, the newspaper or magazine sent by mail or private carrier to homes, businesses, and newsstands in Oklahoma is a fully integrated publication—edited so as to present to the reader a useful and complete package of news, opinion and a wide range of other commercial and non-commercial information; to bar that advertising in Oklahoma would have the effect of barring the entire newspaper or magazine.

ANPA and MPA urge this Court to review the decision below to ensure that it will not provide the basis for such a prohibition on the distribution of newspapers and magazines. The serious error in the decision below is highlighted by its easy applicability to similar regulation of the print media.

II. The Decision Below Conflicts with the First Amendment Principles Stated by This and Other Courts.

A. The Court Below Distorts the Principles and Tests Protecting Commercial Speech.

In the past decade this Court has developed substantial protection for the very kind of commercial speech banned by the State of Oklahoma. Compare *Valentine v. Chrestensen*, 316 U.S. 52 (1932) with *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). As a result, the Court "review[s] with special care regulations [such as this] that entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 556, note 9. Because of this standard of review, "in recent years, this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either

² For some residents of Oklahoma near the borders of the state, out-of-state newspapers or magazines (which may include liquor advertisements) could be their primary source of both news and commercial information.

because it was deceptive or related to unlawful activity." *Id.*³ The decision below violates these principles by approving a ban on truthful commercial speech concerning products lawfully sold in the State of Oklahoma.

In *Central Hudson* this Court stated the following four-part test for the protection of commercial speech:

- (a) is the speech lawful and not misleading;
- (b) is the asserted governmental interest substantial;
- (c) does the regulation "directly advance a governmental interest"; and
- (d) is the regulation "no more extensive than necessary to serve that interest?"

Id. The Court recently noted the critical importance of the last two elements of this test and further refined them:

But the state must assert a substantial interest and interference with speech must be in proportion to the interests served. Restrictions must be *narrowly drawn*, and the state may lawfully regulate *only to the extent* regulation furthers the state's substantial interest.

In re R.M.J., 455 U.S. 191, 203 (1982) (*emphasis added*).⁴

The decision below seriously misconstrues the last two tests under *Central Hudson*. Instead of asking whether the state

³ Although the Oklahoma ban allows limited advertising at the retail outlet, it effects a total prohibition on liquor advertising by the petitioner Cable Companies. Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (hereinafter "Appendix to Petition"), App. H, 52a, 53a. It is undisputed that the advertising is truthful and not misleading.

⁴ The Court has suggested that an appropriate part of the inquiry under the last two tests of *Central Hudson* is whether "disclaimers or explanation," rather than a prohibition may be the appropriate state remedy. *In re R.M.J.*, 455 U.S. at 203. See also *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 570, 571 (Commission to explore alternatives of additions to advertising, not bans). The decision below ignores such possibilities as supplemental educational messages, educational programs, or stricter enforcement of laws relating to abuse of alcohol and focuses only on prohibitions on distribution of truthful information relating to an activity Oklahoma has chosen to keep lawful. Thus, the amount of information available to the public is diminished, not increased.

interest in preventing the problems of alcohol abuse was *directly* advanced by the ban on advertising, the court below merely held it was "reasonably related" to reducing sales and consumption. Appendix to Petition, App. A, 22a.⁵ Instead of searching for other alternatives to a prohibition on expression, the court accepted Oklahoma's choice of the ban as "not unreasonable." *Id.* at 23a, 24a. The decision below thus disregards the direct causal relationship required by this Court's test and substitutes an assumption that a "reasonable relationship exists." It ignores the possibility of more direct means to advance the state's interest—e.g., strict enforcement of statutes relative to operation of motor vehicles while intoxicated or liability for those who sell to or serve intoxicated individuals, advertising of the dangers of excessive consumption or other educational measures to combat the many other causes of the problem—and instead settles on the broadest and least constitutionally acceptable alternative, a total ban on expression.⁶ The failure to genuinely explore the causal relationship and the alternatives to a total prohibition on speech highlights the lower court's failure to properly apply the third and fourth parts of the *Central Hudson* test.

⁵ The court below commenced and concluded its inquiry into this branch of the *Central Hudson* test by paying formal service to the language of this Court requiring that the regulation "directly advance" the state interest. The Court of Appeals, however, converted the inquiry into a mere search for a "reasonable relationship" between the state interest and the regulation—there was no evidence that the ban on advertising actually had any effect on alcohol abuse, but the Court of Appeals *presumed* that it must because advertising seeks to increase sales. This sleight of hand showed disregard both for the careful factual findings of the district court and for the mandate of this Court that there be a clear showing that the ban, in fact, *directly* advances the state interest. Such a showing has not been and cannot be made. Cf. *Craig v. Boren*, 429 U.S. 190, 200-203 (1976) (analysis of statistics revealed absence of evidence that traffic safety directly advanced by gender-based classification).

⁶ Comparison of the district court opinion with the Court of Appeals' opinion reveals contrasting choices of more versus less information to the public. Compare Appendix to Petition, App. G, at 43a (district court opinion) with App. A at 21a-24a (court of appeals opinion). The court of appeals' preference for less information, however, violates the premise for this Court's protection of commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

The Court of Appeals' serious misconstruction of the decisions of this Court is revealed, too, by the conflict between its decision and the careful opinion of the Fifth Circuit Court of Appeals in *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, *reh'g en banc ordered* (5th Cir. March 11, 1983). The Fifth Circuit Court of Appeals properly applied the *Central Hudson* tests and found a similar ban on advertising unconstitutional under the First Amendment.

B. The Court Below Disregards the Critical Relationship Between Commercial and Non-commercial Speech.

This petition for certiorari most dramatically displays the critical relationship between commercial and non-commercial speech in the media. As the district court properly found, many of the programs shown by the Cable Companies simply will not be shown to the citizens of Oklahoma if the ban on liquor advertising is upheld. Appendix to Petition, App. G at 39a.

This case thus involves commercial speech that is not legally or practically separable from the non-commercial expression. *Contra, Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (separate billboards used for commercial and non-commercial messages, although regulation struck down because applied to non-commercial billboards); *Friedman v. Rogers*, 440 U.S. 1 (1979) (regulation of tradenames under which optometrists operated); *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 103 S. Ct. 31 (1982) (regulation of liquor permit holder advertising retail price of alcoholic beverages).

Where the commercial and non-commercial speech are inseparable as a practical matter, this Court should apply a far more stringent test for state regulation. *Compare In re Primus*, 436 U.S. 412 (1978) (invalidation of regulation of non-commercial speech) with *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (test for regulation of isolated commercial speech). Although Oklahoma's regulation may have been

aimed only at commercial speech, its undoubted effect is to foreclose non-commercial expression as well.⁷ See *Minneapolis Star & Tribune Co. v. Commissioner of Revenue*, 51 U.S.L.W. 4315 (U.S. March 29, 1983) (intent of state not critical if regulation has effect of curtailing speech.)

III. The Decision Below Gives Undue Weight to the State Interest Under the Twenty-first Amendment.

The court below gave far less searching scrutiny to the Oklahoma ban because the state interest was asserted to be grounded in the Twenty-first Amendment to the United States Constitution rather than some other state interest. Though the Court of Appeals notes that the Twenty-first Amendment does not change the scope of review, the balancing process by which it upholds the ban on advertising reveals that it gave undue weight to the Twenty-first Amendment. Compare Appendix to Petition, App. A at 17a with App. A at 24a.

This heavy reliance on the Twenty-first Amendment is not only improper under the decisions of this Court concerning that Amendment, *Larkin v. Grendel's Den, Inc.*, 51 U.S.L.W. 4025 (U.S. December 13, 1982), *Craig v. Boren*, 429 U.S. 190, 204-208 (1976)⁸, but also is a misinterpretation of the appropriate inquiry under *Central Hudson*. *Central Hudson* requires only a determination that the state interest is "substantial"; the weight of that interest should not be balanced against the First

⁷ The relationship between truthful commercial advertising and the non-commercial content of the media is well-recognized. For the Oklahoma publisher of a newspaper or magazine, the prohibition on liquor advertising deprives the newspaper, and its readers, of a portion of the diverse financial base that supports non-commercial news and information gathering as well as the opportunity to be fully informed about legal commercial activities within the state. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770 ("the best means to that end is to open the channels of communication rather than close them").

⁸ This case does not involve the kind of "grossly sexual" conduct at issue in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) or *California v. LaRue*, 409 U.S. 109 (1972). Nor does it involve the control of conduct in licensed, public establishments in which liquor is actually sold and served, again unlike *Bellanca* and *LaRue*. Rather, the Petition involves clearly protected communication about a lawful subject of commerce by media that are not subject to the liquor licensing authority of the states.

Amendment or affect the inquiry into whether the regulation directly advances that interest or is as narrowly drawn as possible.⁹

If this Court does not review and correct the decision below, other states will be encouraged to embark on similar regulatory schemes under the same mistaken belief that the Twenty-first Amendment provides them with authority to override other constitutional rights.¹⁰

⁹ The arbitrary balancing process engaged in by the court below should not be encouraged by this Court. If the greater or lesser weight of an interest already found to be "substantial" becomes relevant, the protection provided to commercial speech may become illusory.

¹⁰ The summary dismissal of *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), appeal dismissed, 103 S. Ct. 31 (1982) may have increased the likelihood of such a misinterpretation of the state's power under the Twenty-first Amendment.

CONCLUSION

The decision of the Court of Appeals invites states throughout the country to curtail the flow of commercial information clearly protected by the First Amendment. Regulations such as that upheld below could be used by states to block the flow not only of commercial speech, but of non-commercial expression dependent on and inseparable from commercial speech. Review of the decision below is essential to protect First Amendment rights and to preserve the flow of truthful information to the citizens of Oklahoma and the other states.

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